Supreme Court, U.S.
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No. 05- 051523

IN THE

Supreme Court of the United States

WILLIAM F. MARTIN, JR.,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF VIRGINIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When the police subject a defendant to prolonged detention in a sexually discomfiting environment and under credible threat of indefinite detention until he confesses, is a statement extracted under such circumstances involuntary as a matter of law?

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The Virginia Court of Appeals in the Memorandum of Opinion by Judge Rudolph Bumgardner dated October 11, 2005, is the only written opinion below. By Order dated March 1, 2006, the Supreme Court of Virginia refused to grant an appeal.

STATEMENT OF JURISDICTION

The judgment of the Virginia Court of Appeals was entered on October 11, 2005. The Virginia Supreme Court denied discretionary review in its order dated March 1, 2006. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

After a November 5, 2003 bench trial, the judge of the Albemarle Circuit Court, Charlottesville, Virginia, found William F. Martin, Jr. ("Martin") guilty of having carnal knowledge of an inmate in violation of Virginia Code section 18.2-64.2. On April 14, 2004, the Court heard evidence relevant to sentencing and sentenced Martin to an active term of incarceration of one year.

At trial, the Court considered as evidence a statement Martin gave to two Albemarle County detectives. Prior to trial, Martin moved to suppress his statement on the grounds that it was not voluntary. At a suppression hearing conducted on October 22, 2003, the Court considered testimony relating to the circumstances of Martin's interrogation. In a letter opinion, the Court denied Martin's motion to suppress. The Court reviewed Martin's videotaped statement, the original of which was admitted into evidence and the contents of which were transcribed. The Court denied the motion even though the testimony of the detectives, the testimony of Martin, and the interrogation itself captured on videotape established the involuntary nature of Martin's "confession."

Martin's "confession" resulted from his interrogation on February 25, 2003, by two detectives from the Albemarle police department after receiving a report that Martin had sexual contact with an inmate at the jail. (J.A. p. 16). The interrogation occurred at the police department in an interview room. (J.A. p. 18). Martin was interrogated beginning at or about 6:25 p.m. (J.A. p. 19). Martin was advised of his rights under the *Miranda* decision and executed a waiver. (J.A. p. 20). Detective Jim Bond interrogated Martin for about a half hour before he was joined by detective Gloria Graves. (J.A. p. 22).

The interrogation ended somewhat after approximately 11:45 p.m. (J.A. p. 31). About thirty minutes into the interview, Martin was deprived of his clothing and, for the remaining several hours, wore only a t-shirt and a pair of sweat pants with a hole ripped in the front, exposing Martin's genitals. (J.A. p. 35). Although officers testified Martin was not under arrest, they nevertheless attempted to shackle Martin, but could not because the shackles did not fit.

(J.A. p. 107 ... uring the interrogation, Martin cried on several occas. ... (J.A. p. 33-34).

When Detective Graves arrived, she took the lead in questioning Martin. During her part of the interrogation, Graves physically touched Martin and suggested if Martin did not confess he must be gay.

Significantly, after more than three hours following Graves' touch and suggestion as to Martin's possible sexual deviation, and before any "confession," Detective Bond unequivocally repudiated any notion that Martin was not in custody or was free to leave telling Martin: "I've gotta tell you, we can't leave here tonight without it being resolved." (J.A. p. 510).

The uncontroverted evidence establishes:

a. The interrogation began at 6:20-6:23 and ended at about 11:45, a period of 5 hours and 20 minutes. Martin became focused on simply wanting to go home. "I just want to go home. This is the worst night of my life. I just want to go home." (J.A. p. 568).

b. The "confession" did not begin until after Bond said "I've gotta tell you, we can't leave here tonight without it being resolved." (J.A. p. 510).

c. The officers identified Martin's lifetime desire to be a correctional officer and suggested to him that his confession would make it possible for him to go to work, if not at the jail, somewhere else.

d. Graves purposely used an interrogation "technique" which involved her physical touching, discussion of her own sexual interests, and questioning of Martin's masculinity. (J.A. p. 503-04.)

e. Graves touched Martin immediately after he said the complaining witness never touched him. (J.A. p. 486).

Martin's uncontroverted testimony at the suppression hearing includes:

- That he had had no dinner (J.A. p. 60)
- That he was starting to wear down (J.A. p. 64)
- That he was "mentally and physically . . . wearing out quick" (J.A. p. 64)
- That he was "embarrassed" about his pants (J.A. p. 65)
- That he felt "like I was trapped" (J.A. p. 67)
- That her touch "just broke me down mentally" (J.A. p. 69)
- That "pretty much I wasn't going to be able to leave until I told them what they wanted to hear" (J.A. p. 70)
- That he cried "quite often" (J.A. p. 71)
- That after 2 hours he was "under their influence" (J.A. p. 72)

Martin testified that, the combination of Detective Graves' comments about sexuality and, in particular, about homosexuality, along with the manner in which she touched

Martin in the interview, eventually made Martin unable to state his own feelings and freely exercise his own will as the evening wore on. (J.A. p. 69). During the course of the interrogation, Detective Graves suggested that, if Martin did not admit to having committed the offense by having sex with Sisk, then he must be homosexual or gay. (J.A. p. 48).

As the interrogation wore on, the physical circumstances took on an increasingly menacing character. Martin testified that the detectives had positioned themselves so that his exit from the interview room was blocked. (J.A. p. 66-67). The officers insisted Martin was not under arrest. In fact, they had him trapped in an interview room and had no intention of letting him leave. *Id.* There were occasions during the interrogation when the officers attempted to shackle Martin. During the interview, the officers told Martin that they were going to shackle him and take him to the magistrate's office. (J.A. p. 71). They attempted to put shackles on Martin, but the shackles would not fit. *Id.*

Martin testified that, as the interrogation progressed, he was crying. (J.A. p. 71). Martin testified he had not eaten prior to being interrogated. (J.A. p. 60). Martin testified that as interrogation progressed, he got worn down. *Id.* Martin testified that after about two hours, the responses he gave to his interrogators were not of his own accord. (J.A. p. 72). Martin testified that after about two hours, Martin felt like he was under his interrogators' influence. *Id.* The record discloses there was nothing about his training as a guard or his prior contact with police officers which made him familiar with interrogations or should have prepared him for the detectives' oppressive conduct. (J.A. p. 56).

Even the coercive nature of the interrogation could not produce a clear confession. The very character of Martin's statement reveals a mind overborne by the oppressive circumstances of the interrogation. Martin was clear that he had not had sexual intercourse with Sisk. In testimony at his suppression hearing, Martin was asked why he did not leave the interrogation room and end the questioning. Martin stated: "because I had nothing to hide." (J.A. p. 71.)

Throughout the interrogation, Martin remained firm that he did not have sexual intercourse with Sisk. *See e.g.* (J.A. p. 515, 517, 518, 519). Nevertheless, the detectives continue to press Martin for what they believe was owed — a confession that he penetrated Sisk's vagina with his penis. *Id.* Toward the end of the interrogation, only partly clothed, deprived of food, and under the influence of a female detective who had resorted to tactics designed to humiliate and embarrass Martin, he articulated in the only words he had how his will was being overborne and his capacity for self determination critically impaired:

> A. . . . Ma'am, I am being straight up and — you know something, forget it. You know what, like I told you a little while ago, I'm fighting a losing battle on it, and one thing that I'm sticking by that I know is the truth, I'm losing it —
>
> Q. But Frank — Frank —
>
> A. So I'm going to go ahead and say just to help you all out, yes it happened. It happened.
>
> Q. — that's not what we're after.
>
> A. I'm not going to keep fighting that shit.

Q. Frank, look at me. Frank we don't want you to admit to nothing that didn't happen, but I do want you —

A. But I keep saying it — keep saying it and you —

Q. Cause it happened, didn't it?

A. No it didn't. That's the bad part. It didn't happen, but you keep saying it did, so I might as well say, fuck it, it did.

Q. Frank, why would admit to something that you didn't do, why?

A. Because, I — I swear to God, I'm fighting a losing battle on this part, but I swear to God, it didn't happen. (J.A. p. 528-29).

These exchanges only verify what Martin testified to at the suppression hearing. When he finally gave what proved arguably to be the most incriminating statement of the evening, that he put his hand down Sisk's pants, his will had been overborne and his capacity for self-determination critically impaired. Significantly, as the interview winds down and the interrogators reduce the pressures on Martin and attempt to summarize his confession, Martin denies any digital penetration:

Q. But you did have your fingers in her vagina?

A. It was in front of her — front of her —

Q. Was it in her vagina, though?

A. No, ma'am.

Q. That's not what you said earlier.

A. I don't think it went —

Q. I think you said —

A. No, my finger didn't go up in her, no.

Q. That's not what you said earlier.

A. It sat right there at the front of her.

Q. That's not what you said earlier.

A. No, I'm saying, it didn't go all the way in.

Q. That's not what you said earlier.

A. Okay. (J.A. p. 596-597).

REASONS FOR GRANTING THE PETITION

The Supreme Court of Virginia, Virginia's Court of last resort, erred by refusing to consider whether a confession is involuntary as a matter of law, given after a lengthy, coercive interrogation, and an unequivocal statement by police that the defendant will remain detained until he admits his guilt. The circumstances of this case present a unique question concerning the limits of constitutional voluntariness.

Historically, this Court's examination of constitutional voluntariness considers the totality of the circumstances. However, this Court has yet to elucidate a specific threshold beyond which the conclusion is compelled that the defendant's statement was involuntary as a matter of law. In such landmark cases as *Leyra v. Denno*, 347 U.S. 556, 558, 74 S. Ct. 716, 717, 98 L. Ed. 948 (1954), this Court has

examined those attendant circumstances that render a statement involuntary. This Court has never directly addressed the specific issue raised by the case at bar: When the police have placed and kept a vulnerable defendant in a psychologically discomfiting environment for an extended period and proceed to threaten the defendant, credibly, with the indefinite continuance of that environment unless he confesses, is a confession e..tracted under such conditions involuntary as a matter of law?

The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Prior cases before this Court have established that, in order for a confession to be admissible, it must be made "freely, voluntarily, and without compulsion or inducement of any sort." *Wilson v. United States*, 162 U.S. 613, 623, 16 S. Ct. 895, 40 L. Ed. 1090 (1896). A defendant's due process rights are violated if the police extract a confession from him by coercion, physical or mental, and any confession so obtained is inadmissible. *Leyra v. Denno*, 347 U.S. 556, 558, 74 S. Ct. 716, 717, 98 L. Ed. 948 (1954).

The admission in evidence, over objection, of such a coerced confession vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment. *Payne v. Arkansas*, 356 U.S. 560, at 568, 78 S. Ct. 844, 850, 2 L. Ed. 975 (1958). The question in each such case is "whether the defendant's will was overborne at the time he confessed." *Lynumn v. Illinois*, 372 U.S. 528, 534, 83 S. Ct. 917, 920 (1963); *see also Haynes v. Washington*, 373 U.S. 503, 513, 83 S. Ct. 1336, 1343, 10 L. Ed. 2d 513 (1963). The question of whether a confession was obtained by coercion or improper inducement can be determined only by examination of all the attendant circumstances. *Leyra*, at 558.

Although the Court addressed similar circumstances in *Haynes*, *supra*, it did not directly examine the issue presented here. *Haynes* involved arguably distinguishable attendant circumstances such as a sixteen-hour detention. But *Haynes* also involved a threat by police that the defendant would remain incommunicado until he confessed. As here, the police obtained their confession by telling the defendant in *Haynes*, in essence, that until he confessed to the crime, he would remain in their custody and exclusive control. The Court noted that Haynes was alone, without counsel, and "had 'no reason not to believe that the police had ample power to carry out their threats' 372 U.S., at 534, 83 S. Ct., at 920, to continue, for a much longer period if need be, the incommunicado detention—as in fact was actually done." *Haynes* at 514.

Haynes held that defendant's written statement involuntary and inadmissible. The defendant had been detained incommunicado for 16 hours and was told by the police that he would not be allowed to call his wife until after he made a written confession. The Court found that uncontroverted portions of the record disclosed "the petitioner's confession was obtained in an atmosphere of substantial coercion and inducements created by statements and actions of state authorities." *Id.* at 513. Specifically, "he was alone in the hands of the police, with no one to advise or aid him, and he had 'no reason not to believe the police had ample power to carry out their threats' to continue, for a much longer period if need be, the incommunicado detention." *Id.* at 514; *see also Lynumn*, *supra*, 372 U.S. at 534, 83 S. Ct. at 920. "The petitioner at first resisted making a written statement and gave in only after consistent denials of his request to call his wife . . . Confronted with the express threat of continued incommunicado detention . . . Haynes

understandably chose to make and sign the damning written statement." *Haynes* at 514.

In this case, although detectives initially advised Martin that he was free to leave and also gave him *Miranda* warnings, after two and a half hours of interrogation, one of the officers stated unequivocally, "I've got to tell you we can't leave here tonight without it being resolved." In substance, the police told Martin they would exercise authority over him indefinitely until he confessed. There is no more dramatic instance of police coercion. As in *Haynes*, there was no reason for Martin not to believe they had ample power to carry out their threat.

Haynes stands for the proposition that the credible threat of indefinite detention and the promise of being released from discomfiting circumstances only following a confession, renders that confession involuntary. Although Martin was not subjected to a 16-hour detention, he was subjected to circumstances which suggested to any reasonable person that the interrogation would continue until he gave the police what they wanted.

Moreover, the threat was credible. The police literally had Martin cornered in the interrogation room. (J.A. 66-67). At one point, they attempted to place him in leg irons. (J.A. p. 107). Thus, the concerns addressed indirectly in Haynes existed here, where the police appeared to the defendant able to make good on their threat, "we can't leave here tonight without it being resolved." (J.A. p. 510). Predictably, Martin articulates to some extent, the degree to which he has been "broken down," and no longer speaks of his own volition, telling the detectives, "I'm fighting a losing battle." Significantly, he makes the statement within minutes

of being told, "we can't leave here tonight without it being resolved."

The threat, "we can't leave here tonight without it being resolved," and its power to overbear the defendant's will, must be viewed light of other attendant circumstances. In several landmark cases, this Court applied its totality of the circumstances test to invalidate confessions extracted in factual situations analogous to the present case. Here, the threat, particularly taken in combination with the other attendant circumstances, rendered Martin's statement involuntary.

In *Leyra*, *supra*, the Court held that, when, "[f]or an hour and a half or more, the techniques of a highly trained psychiatrist were used to break petitioner's will in order to get him to say he had murdered his parents," 347 U.S. 559, and this hour and a half session followed several (approximately four) days of "intermittent, intensive police questioning," *id.*, the confession, as well as several others over the five subsequent hours which were part of the same continuous process, were involuntary as a matter of law.

In *Lynumn*, *supra*, the Court held that an oral confession was involuntary when the police elicited the confession by threatening to cut off state financial aid for her infant children and take them from her if she did not "cooperate," and the petitioner "had had no previous experience with the criminal law, and had no reason not to believe that the police had ample power to carry out their threats." 372 U.S. at 534. At the time, the petitioner was "encircled in her apartment by three police officers and a twice convicted felon who had purportedly 'set her up,'" and was otherwise alone, without friend or counsel. *Id.*

Taken in their totality, the circumstances in this case reveal a confession obtained by coercion or improper inducement. The petitioner was clothed in rags and distressed and embarrassed (J.A. 65), subject to interrogation by a female detective while he was clothed in a pair of sweat pants that exposed his genitals. Leyra was subjected to "the techniques of a highly trained psychiatrist" that were used "to break petitioner's will in order to get him to say he had murdered his parents." 347 U.S. at 559. Petitioner was subject to a female interrogator's "techniques" involving challenges to sexual normalcy, touching and use of disgusting recollections about her sexual deviations.

Leyra "confessed" "after an hour and a half or longer . . . encouraged by the doctor's assurances that he had done no moral wrong and would be let off easily." *Id.* at 560. Petitioner "confessed" after more than two hours, encouraged by the female interrogator's assurances that he was simply being sexually normal and would find a new job in corrections somewhere else. The Court found from undisputed facts in *Leyra*, that he was deprived of his "mental freedom to 'confess or deny suspected participation in a particular crime,'" *Id.* at 561.

In this case, petitioner was told unequivocally that he had no freedom, arguably mental or actual, to deny the allegation because he was not going to leave the interrogation until he gave them the answers they wanted. Leyra's interrogation was from approximately 5:00 p.m. to 10:00 p.m. In this case, petitioner was interrogated from approximately 6:25 p.m. to 11:45 p.m. As in both *Haynes* and *Lynumn*, the defendant was unassisted and alone with his interrogators and had no reason not to believe that the police were able and willing to carry out their threat.

When detectives place a defendant in a coercive environment and tell him he will remain there until he confesses, there should arise, as a matter of law, a presumption a statement that follows is involuntary. This Court's cases suggest such a rule, but no case explicitly states it. This case invites the Court to make explicit what has previously been implicit in cases considering constitutional voluntariness.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests the Supreme Court grant a review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM OPINION OF THE COURT OF APPEALS OF VIRGINIA DATED OCTOBER 11, 2005

COURT OF APPEALS OF VIRGINIA

Present: Judges Elder, Bumgardner and Frank
Argued at Richmond, Virginia

Record No. 1204-04-2

WILLIAM FRANK MARTIN, JR.

v.

COMMONWEALTH OF VIRGINIA

MEMORANDUM OPINION* BY
JUDGE RUDOLPH BUMGARDNER, III
OCTOBER 11, 2005

The trial court convicted William Frank Martin, Jr. of carnal knowledge of an inmate, Code § 18.2-64.2. He appeals the denial of his motion to suppress his statement to police and the finding that the evidence was sufficient to convict. Finding no error, we affirm.

On appeal, we view the evidence and the reasonable inferences fairly deducible therefrom in the light most favorable to the Commonwealth. *Commonwealth v. Hudson*, 265 Va. 505, 514, 578 S.E.2d 781, 785, *cert. denied*, 540

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* Pursuant to Code § 17.1-413, this opinion is not designated for publication.

U.S. 972 (2003). The defendant was a corrections officer at the Albemarle Regional Jail. Around 4:30 a.m., the victim was working alone in the jail laundry room. The defendant made suggestive remarks and later assaulted her in the storage closet. He began by touching her all over both inside and outside her clothing. He inserted his finger and then his penis in her vagina. He stopped when the victim told him she was positive for Hepatitis B and C, but he warned her that she would lose her trustee status if she reported him.

A few hours after the incident, Corrections Officer Ruby Keffer observed the victim was shaking like a leaf and looked like she had been crying. The victim explained the defendant had assaulted her and then made a written complaint. Jail authorities and the police interviewed the victim, and a Sexual Assault Nurse Examiner examined her later that day. The nurse found one tear in the vagina and one laceration in the vaginal area. She did not feel it was likely that the laceration was self-induced.

Sergeant James Bond interviewed the defendant at 6:25 p.m. that evening at the Albemarle police department. He advised the defendant of his *Miranda* rights and obtained a signed waiver before beginning the interview. During the interview, the defendant agreed to let the police take his clothing for testing. He changed into a t-shirt and sweatpants that he retrieved from his car.

Detective Gloria Graves joined the interview. She clarified that the *Miranda* warnings still applied. The defendant acknowledged that he understood his rights, that he was free to go, and that he agreed to continue the interview.

Appendix A

While the defendant was detained over five hours, the interview lasted one hour forty-seven minutes. During the interview the defendant never requested an attorney, attempted to terminate the interview, or indicated he was hungry or uncomfortable in any way. He was given cigarette and bathroom breaks and was offered liquids. He left the police station around 11:30 p.m.

The defendant submitted the videotape of the interview as the sole evidence supporting his motion to suppress. He maintained that his discomfort, fatigue, and "severe psychological strain" caused by police misconduct rendered his admissions involuntary. The trial court viewed the videotape and issued a letter opinion with detailed findings of fact that reviewed the defendant's physical and psychological condition and the interrogation tactics used by the police. The trial court concluded the defendant's statement "was the product of an essentially free and unconstrained choice by him and that he was not overborne born [sic] by the police which impaired his ability to make a voluntary statement about his involvement in the matter." The trial court specifically found that the defendant did not display any signs of discomfort during the interview and that the police conduct did not render his admissions involuntary.

"Voluntariness is a question of law, subject to independent appellate review," *Midkiff v. Commonwealth*, 250 Va. 262, 268-69, 462 S.E.2d 112, 116 (1995), but "subsidiary factual determinations are entitled to a presumption of correctness," *Jenkins v. Commonwealth*, 244 Va. 445, 453-54, 423 S.E.2d 360, 366 (1992). Our review is to determine whether the evidence supports the trial court's

finding of voluntariness but not to conduct a *de novo* determination of historical facts by viewing the videotape. *Commonwealth v. Hilliard*, 270 Va. 42, 50-51, 613 S.E.2d 579, 585 (2005); *Terrell v. Commonwealth*, 12 Va. App. 285, 290, 403 S.E.2d 387, 389-90 (1991).

"The test for voluntariness is whether the statement is the 'product of an essentially free and unconstrained choice by its maker,' or whether the maker's will 'has been overborne and his capacity for self-determination critically impaired.'" *Jenkins*, 244 Va. at 453-54, 423 S.E.2d at 366 (quoting *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961)). We consider, in light of the totality of circumstances, the defendant's experience and background as well as the conduct of the police. *Midkiff*, 250 Va. at 268, 462 S.E.2d at 116. In assessing the defendant's condition we consider his "age, intelligence, mental and physical condition, background and experience with the criminal justice system. . . ." *Bottenfield v. Commonwealth*, 25 Va. App. 316, 323, 487 S.E.2d 883, 886 (1997). *See also Gray v. Commonwealth*, 233 Va. 313, 324, 356 S.E.2d 157, 163 (1987).

While "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary,'" *Colorado v. Connelly*, 479 U.S. 157, 167 (1986), "the voluntariness of a confession cannot be equated to the absolute absence of intimidation," *United States v. Wertz*, 625 F.2d 1128, 1134 (4th Cir. 1980). *See also Peterson v. Commonwealth*, 15 Va. App. 486, 488, 424 S.E.2d 722, 723 (1992). We must consider "the interrogation techniques employed, including evidence of trickery and deceit, psychological pressure, threats or promises of leniency, and duration and circumstances of the interrogation." *Terrell*, 12 Va. App. at 291, 403 S.E.2d at 390.

Appendix A

The record supports the trial court's finding that the defendant's admissions were voluntarily made. The twenty-eight-year-old defendant had a high school diploma; received the grade of A in a criminal justice class he took; and was employed as a corrections officer. He acknowledged he was not under arrest, was free to leave, understood his *Miranda* rights, and voluntarily agreed to speak with the officers.

The defendant was not under the influence of alcohol or drugs. He wore his own clothing and never indicated any discomfort. He was provided with breaks and something to drink. He never asked for food, and never stated he was uncomfortable, hungry, or tired at any point during the interrogation.

While the officers used several interviewing techniques, the evidence does not support the defendant's claim that they overstepped their bounds and overwhelmed him. The officers did not lie, use trickery or deceit. They did not make any promises or physically overpower the defendant. Indeed, they insisted that the defendant "should not admit to anything that was not the truth." Credible evidence supports the trial court's finding that the defendant's statement was freely and voluntarily made.

The defendant also maintains the evidence was insufficient to convict. He stresses that the victim made inconsistent statements that make her testimony not credible. Prior inconsistent statements are a factor for the trial court to consider in determining the witness' credibility but do not automatically render her trial testimony incredible. *Fordham v. Commonwealth*, 13 Va. App. 235, 240, 409 S.E.2d 829,

832 (1991). The trial court resolved inconsistencies in the victim's testimony and found her to be a credible witness. *Marable v. Commonwealth*, 27 Va. App. 505, 509-10, 500 S.E.2d 233, 235 (1998).

A sex offense "may be sustained solely upon the testimony of the victim." *Ashby v. Commonwealth*, 33 Va. App. 540, 548-49, 535 S.E.2d 182, 187 (2000). However, in this case this victim's testimony is corroborated by the description of the victim's demeanor shortly after the incident, by the nurse's explanation of the victim's physical injuries, and by the defendant's admissions. He acknowledged he put the victim's hand on his penis, he rubbed his penis against her buttocks, inserted his finger in her vagina, and he might have inserted his penis as well. The defendant himself admitted most of the elements of the offense. Credible evidence supports the trial court's conclusion that the evidence proved the offense. Accordingly, we affirm the conviction.

Affirmed.

APPENDIX B — SENTENCING AND CONVICTION FINAL ORDER OF THE CIRCUIT COURT OF THE COUNTY OF ALBEMARLE DATED MAY 7, 2004

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF ALBEMARLE ON THE CRIMINAL SIDE THEREOF, HELD ON *APRIL 14, 2004.*

PRESENT: HON. ARTHUR W. SINCLAIR

COMMONWEALTH OF VIRGINIA

VS.

WILLIAM FRANK MARTIN, JR.

SSN: *228-39-8361* SEX: *male*
DOB: *02/19/1965* RACE: *white*
STATUS: *bail*

Case Number	Offense	F/M	Offense Date	Virginia Code Section
16,586	Carnal Knowledge with inmate while having a position of authority over said inmate	F	02/25/2003	18.2-64.2

Attorney for the Commonwealth: *Darby Lowe*

Attorney for the Defendant: *Francis McQ. Lawrence and Rhonda Quagliana*

Appendix B

The defendant was present with his attorney.

On *January 6, 2004*, the defendant was found guilty as charged above.

The pre-sentence report was considered and ordered filed as a part of the record in this case in accordance with the provisions of Virginia Code Section 19.2-299.

The Attorney for the Commonwealth and the Defendant were given the opportunity to present evidence pertaining to sentencing.

Pursuant to the provisions of Virginia Code Section 19.2-298.01, the Court has considered the applicable discretionary sentencing guidelines and the guidelines worksheets.

Before pronouncing the sentence, the Court inquired if the defendant desired to make a statement and if the defendant desired to advance any reasons why judgment should not be pronounced.

The Court **SENTENCED** the defendant to incarceration with the Virginia Department of Corrections for the term of *three years*. The Court **SUSPENDED** *two years* of the sentence.

***SENTENCING SUMMARY*:**

TOTAL SENTENCE IMPOSED: *three years*

TOTAL SENTENCE SUSPENDED: *two years*

Appendix B

The suspended portion of the defendant's sentence was suspended on the following conditions:

GOOD BEHAVIOR. The defendant shall be of good behavior and not violate any penal laws of this Commonwealth or any of its political subdivisions for the term of *one* year from the date of his release from incarceration.

SUPERVISED PROBATION. Upon release from incarceration the defendant shall be placed under supervised probation with the Probation Officer of this Court for the term of *one year.*

COURT COSTS. The defendant shall pay Court costs on an installment basis.

This sentence shall run consecutively to any other sentences imposed.

The Court certifies that at all times during the trial of this case the defendant was personally present and counsel for the defendant was personally present.

ENTER: s/ Arthur W. Sinclair
JUDGE

DATE: May 7, 2004

APPENDIX C — CONVICTION ORDER OF THE CIRCUIT COURT OF THE COUNTY OF ALBEMARLE DATED JANUARY 6, 2004

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF ALBEMARLE ON THE CRIMINAL SIDE THEREOF, HELD ON *JANUARY 6, 2004.*

PRESENT: HON. ARTHUR W. SINCLAIR

COMMONWEALTH OF VIRGINIA

VS.

WILLIAM FRANK MARTIN, JR.

SSN: *228-39-8361* Sex: *male*
DOB: *02/19/1965* Race: *white*
STATUS: *bail*

Case Number	Offense	F/M	Offense Date	Virginia Code Section
16,586	Carnal Knowledge with inmate while having a position of authority over said inmate	F	02/25/2003	18.2-64.2

Attorney for the Commonwealth: *Darby Lowe*

Attorney for the Defendant: *Francis McQ. Lawrence*

Appendix C

The defendant was present with his attorney.

On *November 5, 2003* the Court took this matter under advisement.

The Court, having heard the evidence and argument of counsel and having thoroughly considered this matter, finds the defendant guilty as charged in the indictment.

The Court, before fixing punishment or imposing sentence, directs the Probation Officer of this Court to thoroughly investigate and report to the Court as provided by law on the ***14th*** day of ***April*, 2004** at 9:30 a.m.

The defendant is **ORDERED** to cooperate fully and promptly in providing information and permitting the withdrawal of blood samples as required by law.

The Court certifies that at all times during the trial of this case, the defendant was personally present with his attorney.

The defendant was permitted to depart under his former recognizance with the additional conditions that he maintain contact with his attorney and that he cooperate fully with the Probation Officer in the preparation of the pre-sentence report.

ENTER: s/ Arthur W. Sinclair
JUDGE

DATE: January 6, 2004

APPENDIX D — ORDER OF THE CIRCUIT COURT OF THE COUNTY OF ALBEMARLE TAKING THE CASE UNDER ADVISEMENT DATED JANUARY 6, 2004 (PER NOV. 5, 2003 HEARING)

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF ALBEMARLE ON THE CRIMINAL SIDE THEREOF, HELD ON *NOVEMBER 5, 2003.*

PRESENT: HON. ARTHUR W. SINCLAIR

COMMONWEALTH OF VIRGINIA

VS.

WILLIAM FRANK MARTIN, JR.

SSN: *228-39-8361* Sex: *male*
DOB: *02/19/1965* Race: *white*
STATUS: *bail*

Case Number	Offense	F/M	Offense Date	Virginia Code Section
16,586	Carnal Knowledge with inmate while having a position of authority over said inmate	F	02/25/2003	18.2-64.2

Attorney for the Commonwealth: *Darby Lowe*

Attorney for the Defendant: *Francis McQ. Lawrence and Rhonda Quagliana*

Appendix D

The defendant was present with his attorney.

Whereupon the accused, after private consultation with counsel, and being advised by his counsel, pleaded **not guilty** to the indictment, which plea was tendered by the accused in person, and after being advised of his right to trial by jury, the accused in person, knowingly and voluntarily waived trial by jury, and with the concurrence of the Attorney for the Commonwealth and the Court, here entered of record, the Court proceeded to hear the case without the intervention of a jury as provided by law and having heard the evidence and argument of counsel, takes this matter under advisement.

The Court certifies that at all times during the trial of this case the defendant was personally present with his attorney.

The defendant was permitted to depart until December 1, 2003 at 9:30 a.m. at which time he shall appear in this Court to select a further hearing date.

ENTER: s/ Arthur W. Sinclair
JUDGE

DATE: January 6, 2004

APPENDIX E — LETTER OPINION OF THE COMMONWEALTH OF VIRGINIA, SIXTEENTH JUDICIAL CIRCUIT DENYING MOTION TO SUPPRESS DATED OCTOBER 30, 2003

COMMONWEALTH OF VIRGINIA
Sixteenth Judicial Circuit

October 30, 2003

Richard Moore, Esquire
Deputy Commonwealth's Attorney
County of Albemarle County
410 East High Street
Charlottesville, Virginia 22902

Francis McQ. Lawrence, Esquire
St. John, Bowling & Lawrence, LLP
416 Park Street
Charlottesville, Virginia 22902

RE: *Commonwealth of Virginia v. William F. Martin, Jr.*

Dear Counsel:

This matter comes before the Court on the Motion to Suppress filed by the Defendant, William F. Martin, Jr., seeking to suppress any and all statements made by him to the Albemarle County Police on the basis that said statements were involuntary and in violation of his Fifth Amendment Rights under the Constitution of the United States and of Virginia.

Appendix E

A hearing was held on October 22, 2003 at which evidence was presented. The Court took the motion under advisement to watch the video/audio taped statement made to the police by the defendant on February 25, 2003. The Court has reviewed that video/audio tape in its entirety with the aid of the transcript of that interview provided to the Court.

FACTUAL FINDINGS

The Defendant, William Frank Martin, Jr. is charged with carnally knowing L.S. on February 25, 2003 while being an employee of a local correctional facility and knowing that L.S. was an inmate of such correctional facility in violation of Section 18.2-64.2 of the Code of Virginia of 1950, as amended.

The Defendant had worked from 5:30 p.m. on February 24 until 6:00 a.m. on February 25, 2003. It was during this period of employment at approximately 4:30 a.m. that the alleged incident of carnal knowledge took place at the local correctional facility in Albemarle County, Virginia.

The Defendant reported for work at approximately 5:15 p.m. on February 25, 2003 after getting off from work earlier that day at 6:00 a.m. Prior to reporting to work, the inmate, L.S., made the complaint of sexual battery by the Defendant. Upon reporting to work, the Albemarle County Police had been contacted and Sgt. Jim Bond had interviewed the inmate and others at the correctional facility. Additionally, Detective Gloria Graves had been assigned to the case from the Albemarle County Police Department and she interviewed witnesses as well.

Appendix E

Upon arriving at the Charlottesville-Albemarle-Nelson Regional Jail at approximately 5:15 p.m., Mr. Martin was asked by Major Wells to come into a side room of the jail where he met with Detective Jim Bond. Detective Jim Bond advised Mr. Martin that he was not under arrest and that he had not been charged but wanted to speak to him. Mr. Martin agreed to speak with Sgt. Bond and the two rode to the Albemarle County Police Department on McIntire Road in the City of Charlottesville and arrived at the county police department at approximately 6:20 p.m. Defendant Martin was dressed in his correctional officer uniform.

The interview at the Albemarle County Police Department began according to the tape at eighteen (18) hours, twenty-four (24) minutes and nine (9) seconds on February 25, 2003. The interview begins showing the Defendant, William F. Martin, Jr. dressed in his uniform seating in the interview room. Sgt. Jim Bond is also shown in the room. Sgt. Bond begins filling out a form called a Consent to Search regarding the person, vehicle and home of Mr. Martin. Mr. Bond notes the time in the tape as 6:23 p.m. when he ask Mr. Martin to sign the consent to search form. At 6:25 p.m., Sgt. Bond advises the Defendant that he is being interviewed in connection with the alleged commission of the crime of sexual battery. He then reads Miranda Rights to the Defendant who indicates he understands the rights that have been explained to him and that he does wish to talk to Detective Bond. He signs a written waiver form and writes in the words "yes" to each of the questions of understanding his rights and wishing to talk to Detective Bond.

Appendix E

Mr. Martin indicates in response to a question that he is 28 years of age. Evidence at the hearing on October 22, 2003 indicated that the Defendant dropped out of high school in the 11th grade having received grades of B's, C's and D's. After taking a correspondence course, two years after graduation he got a high school diploma. Additionally, he took a class at Piedmont College in criminal justice and received the grade of A. Defendant Martin had worked as a correctional officer at the jail for approximately two years and worked for the federal court as a security officer prior to that employment. He had a state license in security. His past experience with the criminal justice system were traffic tickets for speeding and reckless driving and a trespass at Lake Monticello for swimming. He was not represented by a lawyer. He was also charged with assault and battery six or seven years ago and he represented himself in Court.

Continuing the interview, Detective Bond then tells Defendant Martin the nature of the complaint which was that an inmate, by the name of Lisa Sisk, contacted the police the afternoon of February 25. The police had interviewed her and she said she got up in the morning at approximately 4:30 a.m. and went down to do her job in the laundry room. She indicated that Defendant Martin came down and made some comments to her, touched her on the buttocks, touched her on the top of her clothes and between her legs. She indicated that Officer Martin talked to her about sexual things, she got down on her knees and that he touched her buttocks again, touched her between the legs, and she got up. Both then went in to a small storage room where Officer Martin pulled her pants down, touched her on the buttocks, put his fingers in her vagina, and had sexual intercourse with her.

Appendix E

Defendant Martin then tells his side of the story and denies that he ever touched Lisa Sisk in any way in a sexual manner. He only admits that he may of touched her on her back as he got up and walked between some shelves. After further discussion and a continual denial by Mr. Martin that he touched Lisa Sisk in any way sexually, at eighteen (18) hours, fifty-eight (58) minutes, forty-one (41) seconds Sgt. Bond indicates he is going to step out of the room and does so. The Defendant sits in a chair in the room until nineteen (19) hours six (6) minutes thirteen (13) seconds when he leaves the room to go to the bathroom. At nineteen (19) hours eight (8) minutes thirty-four (34) seconds the Defendant is back in the room and stays there alone until he leaves at nineteen (19) eight (8) minutes forty-seven (47) seconds to change his clothes. At nineteen (19) hours fifty-seven (57) nineteen (19) seconds the Defendant is shown to be back in the room in sweatpants and a t-shirt. At twenty (20) hours one minute thirty-two (32) seconds the defendant gets up and goes out of the room and returns at twenty (20) hours three (3) minutes twelve (12) seconds where he remains in the room by himself. At twenty (20) hours five minutes fifty-three (53) seconds Gloria Graves and Jim Bond come in the room. After some introductory conversation with Detective Graves, at twenty (20) hours eight (8) forty-four (44) seconds Detective Graves affirms with the Defendant that Sgt. Bond has read him his Miranda Rights, which he acknowledges. Officer Graves then asked if the Defendant would like the rights re-read to him and he says that's not necessary. Detective Graves reminds him that the rights still stand. The Defendant affirms. Detective Graves then advises the Defendant he was not under arrest and that the only reason that the door is closed is to provide privacy. Furthermore, he

is advised if he wants to get up and walk away from the interview he may do so.

Detective Graves then explains she has additional information that four (4) different females have reported that he had sex with them, or had fondled them, brushed up against them, felt their chest, their breasts, or their butt. Detective Graves then indicates that she wants Mr. Martin to be open with her even though she is a female detective and wants him to be comfortable talking to her. He indicates it is hard to get comfortable and she indicates that no one is trying to put pressure on Mr. Martin but want him to be as comfortable as possible in the interview. As the interview progresses, Mr. Martin denies any sexual contact with any inmate or other person at the complex. When pressed about whether or not Lisa Sisk touched his penis, he denies that happened at twenty hours (20) thirty-eight (38) minutes sixteen (16) seconds on the tape.

After continual denials of any sexual contact and Detectives Bond and Graves continually reminding Mr. Martin that four (4) females had complained of inappropriate sexual contact, Mr. Martin suggests to Graves and Bond that they do not believe and him that he ought to just say "yes", it's done, it's over with and he quits. Detective Graves says in response that she does not want anything said that is not the truth. He again denies that he is lying and asks for a cigarette break. Detectives Graves and Bond then have a discussion about putting leg irons on Mr. Martin and the detectives having to retrieve leg irons from the police car. Before breaking for the cigarette, Detective Graves indicates that she is going to let him smoke a cigarette and he can

come back in. She then asks do you want to talk to us still Mr. Martin says yes. After attempting to put leg irons on Mr. Martin, the detectives indicate that they are not large enough and decide to let Mr. Martin take a cigarette break in the presence of Detective Bond.

After the cigarette break at twenty (20) hours fifty-seven (57) minutes fourteen (14) seconds Detective Graves reminds Mr. Martin that his rights still remain, which he acknowledges and indicates he still wants to talk to the police. This occurs at twenty-one (21) hours six (6) minutes fourteen (14) seconds into the interview.

After discussion about his job at the jail and going to Court over a charge, at twenty-one (21) hours thirteen (13) minutes fourteen (14) seconds into the interview Mr. Martin indicates that Lisa Sisk showed him her tattoo on her buttocks area in the storage room. He denies that he had sex with her at twenty-one (21) hours fifteen (15) minutes twenty-six (26) seconds into the interview. At twenty-one (21) hours fifteen (15) minutes fifty-nine (59) seconds into the interview he indicates that his hand may have hit her butt.

At twenty-one (21) hours seventeen (17) minutes twelve (12) seconds into the interview he indicates that she touched his penis with her hand. Again at twenty-one (21) twenty-one (21) minutes fifteen (15) seconds into the interview he admits that she had her hand on his penis.

At twenty-one (21) hours thirty-seven (37) minutes twelve (12) seconds he indicates that she put his hand down her pants.

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Finally, at twenty-one (21) hours forty-two (42) minutes forty (40) seconds Mr. Martin breaks down and indicates the sexual contact but denies sexual intercourse.

At twenty-two (22) hours two (2) minutes fifty-nine (59) seconds he breaks for a cigarette and leaves the room at twenty-two (22) hours three (3) minutes twenty-four (24) seconds.

The tape then shows that the Defendant returns to the room at twenty-two (22) hours nine (9) minutes fifty-two (52) seconds and the interview continues about contact with other inmates or an employee at the jail. The third segment of the interview concludes at twenty-two (22) hours thirty-one (31) minutes thirteen (13) seconds when both detectives leave the room. At twenty-two (22) hours thirty-one (31) minutes thirty-three (33) seconds Detective Graves comes back in and the interview is concluded at twenty-two (22) hours forty-four (44) minutes forty-five (45) seconds.

The sweatpants worn by the Defendant were introduced as Defendant's Exhibit #1 at the hearing on October 22, 2003. The sweatpants show there is a hole near the crotch area of the sweatpants. During the interview, the Defendant never seemed to be self conscious about any hole in his pants or demonstrate any feeling of being uncomfortable. During the interview he got up and walked around the room to demonstrate certain things to the detectives and there was never any noticeable exposure of his private parts through any hole in the sweatpants. There was never any indication that he was seeking to cover himself because of his embarrassment about their being a hole in the sweatpants.

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Furthermore, his overcoat to his uniform was over the chair next to him, which he retrieved when he ended the interview.

Regarding any physical contact between the detectives and the Defendant, at one point in the interview at twenty (20) hours thirty-nine (39) minutes Detective Graves asked the Defendant if she could touch him about the arm. While he did not object verbally to the touching, he did withdraw to the extent that Detective Graves advised him that she was not going to touch him. Mr. Martin did ask for a cigarette break and Detective Graves did indicate she would give him one after some further discussion and stating that she wanted Mr. Martin to be comfortable with her and Detective Bond.

Additionally, Detective Graves indicated early on in the interview at page 40 of the transcript that it was normal for a man to react to a touching by a female in a sexual way if the man was not gay or homosexual. Mr. Martin responded to the comment that he had had inmates come on to him in a sexual way by complimentary comments about his eyes or looks.

As t any reference to religion, the Defendant in professing his innocence and truthfulness indicated he would lay his hand on a stack of bibles . . . for God's sake."

ISSUE PRESENTED

Was the confession by the Defendant the product of an essentially free and unconstrained choice or was the accused will overcome in his capacity for self determination critically impaired?

Appendix E

DISCUSSION OF LAW

The Commonwealth has the burden of establishing by preponderance of the evidence that a statement by an accused admitting his participation in criminal activity or implicating himself was freely and voluntarily made. *Wilson v. Commonwealth*, 13 Va. App. 549, 554 (1992).

Voluntariness is determined by considering the totality of the circumstances, and such circumstances can be grouped into two categories:

> (1) Factors relating to the physical and psychological condition of the suspect and (2) factors relating to police tactics used during interrogation. See Virginia Criminal Procedure, Fourth Edition, Ronald J. Bacigal, Section 7-2 at page 157.

Bacigal goes on to say:

> The Court must consider all of the individual characteristics of the particular suspect. Factors considered by the Virginia Courts include suspect's (1) intelligence, (2) education, (3) prior experience with police, (4) use of drugs or alcohol, (5) emotional or mental disability, and (6) deprivation of physical comforts. With regards to police interrogation tactics, the courts have considered (1) trickery and deceit,

> (2) psychological pressures, (3) threats or promises of lenience, and (4) the duration and circumstances of the interrogation.

Id. at 157.

ANALYSIS

Applying the factors, the Court notes as follows:

(1) Intelligence – Mr. Martin was able to comprehend questions and provide detailed answers in response to those questions presented by the police; he appears to be average or above average in intelligence;

(2) Education – Mr. Martin has achieved his high school diploma after dropping out of school in the 11th grade; he received a grade of A in a criminal justice course post high school; he was licensed as a security guard in the federal system and has had on the job education for two years as a correctional officer;

(3) Prior Experience with the Police – He has had minor contact with the police regarding violations of the law where he has not had the assistance of an attorney in Court; he has worked with police as a security officer in the federal system and as a correctional officer in the state system;

(4) Use of Drugs or Alcohol – There is no evidence of use of drugs or alcohol by Mr. Martin at any pertinent time in question;

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(5) Emotional or Mental Disability - He did show some emotional upset by crying during the interview but there appeared to be no emotional or mental disability where he did not comprehend questions other than becoming frustrated with the police when they did not believe that he had had no sexual contact with the alleged victim; and

(6) Deprivation of physical comforts - He was given a bathroom break early in the interview; cigarette breaks during the course of the interview and offered something to drink; additionally, he was asked to change his clothes, which he did and after which he made no complaint about physical comforts.

With regard to police interrogation tactics, there appears to be no trickery and deceit used where facts were misrepresented to him or he was lied too intentionally. As to psychological pressures, the police did confront him on many occasions with facts such as four females complaining he had acted inappropriately with them sexually; confronted that the police did not believe he was telling the truth; suggestions by the police that the victim led him on and made sexual advances to him; suggestions to the Defendant that this was not the most serious type of criminal offense such as murder; suggestions that his concerns about his job would not prevent him from getting another acceptable job; and when the Defendant said he might as well go ahead and admit his guilt since they did not believe him, the detectives asserted that he should not admit to anything that was not the truth. There were no threats or promises of leniency by the detectives.

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Finally, the duration of the interview was divided into three segments. The first segment lasted from eighteen (18) hours thirty-one (31) minutes fifty-seven (57) seconds to eighteen (18) hours fifty-eight (58) minutes forty-one (41) seconds or approximately twenty-seven (27) minutes. The second segment of the interview lasted from twenty (20) hours eight (8) minutes fifty-four (54) seconds to twenty (20) hours fifty-two (52) minutes fifty-six (56) seconds, or approximately forty-four (44) minutes. The third segment of the interview lasted from twenty-one (21) hours six (6) minutes fourteen (14) seconds to twenty-one (21) forty-two (42) minutes forty (40) seconds or approximately thirty-two (32) minutes. The circumstances of the interrogation were that Detective James Bond conducted the interview during the first segment. Detective Gloria Graves and Detective Bond conducted the remaining two segments of the interview at the police station in an interview room under the conditions noted in the Factual Findings.

Finally, the existence of any of the above factors does not necessitate a finding that the confession was involuntary. The factors are merely evidence which the trial judge must consider in determining whether the prosecution has met its burden of proving by a preponderance of the evidence that the confession was voluntary. See Bacigal at Section 7.2, page 157.

Under a full analysis based on the above factors, the Court finds that the statement of the Defendant was the product of an essentially free and unconstrained choice by him and that he was not overborne born by the police which impaired his ability to make a voluntary statement about his involvement in the matter.

Appendix E

Accordingly, the Motion to Suppress is denied.

Very truly yours,

s/ Paul M. Peatross, Jr.
Paul M. Peatross, Jr.
Judge

APPENDIX F — ORDER OF THE SUPREME COURT OF VIRGINIA DENYING APPEAL DATED MARCH 1, 2006

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 1st day of March, 2006.

Record No. 052266
Court of Appeals No. 1204-04-2

William F. Martin, Jr.,

Appellant,

against

Commonwealth of Virginia,

Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court refuses the petition for appeal.

A Copy,

Teste:

Patricia L. Harrington, Clerk
By: /s/ E. Edwards
Deputy Clerk